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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

MARIA LAZOS, et al,

Plaintiff,

vs.

CITY OF OXNARD, et al,

Defendants.

TOMAS BARRERA, SR.

Plaintiff,

vs.

CITY OF OXNARD, et al,

Defendants.

Case No. CV 08-02987 RGK (SHx)

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION IN LIMINE  
NO. 9 TO EXCLUDE REFERENCE TO  
AND QUESTIONS REGARDING  
CHARACTER EVIDENCE AND  
EVIDENCE OF OTHER ALLEGED  
BAD ACTS**

Date: August 11, 2009  
Time: 9:00 a.m.  
Courtroom: 850

Plaintiffs, MARIA LAZOS and TOMAS BARRERA, SR., individually and as representatives of the ESTATE OF TOMAS BARRERA, hereby file their Opposition to Defendants' Motion in Limine No. 9 TO Exclude Reference to and Questions Regarding Character Evidence and Evidence of Other Alleged Bad Acts.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

#### PRIOR USE OF FORCE INCIDENTS INVOLVING SALINAS ARE ADMISSIBLE TO SHOW INTENT AND PLAN

Fed.R.Evid. 404(b) provides that,

*“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...”*

In this case it is submitted that the prior incidents involving Salinas are relevant to prove Salinas’ intent and plan to shoot decedent, and show a pattern of operation that would suggest intent.

Proof of other crimes has been held admissible to show a common scheme, plan, design, system, course of conduct, or to establish motive or intent, or absence of mistake or accident. Parker v. U.S., 400 F.2d 248, 252 (9<sup>th</sup> Cir., 1968) *citing* Simons v. United States, 119 F.2d 539 (9th Cir.), Reed v. United States, 364 F.2d 630, 633 (9th Cir. 1966). Rule 404(b)’s terminology of ‘other crimes, wrongs, or acts’ includes conduct that is neither criminal nor unlawful if it is relevant to a consequential fact. U.S. v. Long 328 F.3d 655, 661 (D.C., 2003). The other activity need not have resulted in a charge or conviction; indeed, the defendant may even have been acquitted of the conduct, or the conduct may have been entirely lawful. *Id.*, *citing e.g.*, United States v. Cavin, 39 F.3d 1299, 1311 (5th Cir.1994); United States v. Ashman, 979 F.2d 469, 492 (7th Cir.1992); United States v. Brown, 961 F.2d 1039, 1042 (2d Cir.1992); United States v. Atwell, 766 F.2d 416, 421-22 (10th Cir.1985). What matters is that the evidence be relevant “to show a pattern of operation that would suggest intent” and that tends to undermine the defendant’s innocent explanation. U.S. v. Long, *supra*. The admissible bad acts evidence need not show

1 incidents identical to the events charged, so long as they are closely related to the  
 2 offense. *Id.*, citing United States v. DeLoach, 654 F.2d 763, 769 (D.C.Cir.1980).  
 3 Relevance is established by any showing, however slight, which makes it more likely  
 4 than it was before the admission of the evidence that the defendant committed the  
 5 crime in question. U.S. v. Federico, 658 F.2d 1337, 1342 (9<sup>th</sup> Cir. 1981). The  
 6 evidentiary fact offered does not need to have strong, full, superlative, probative  
 7 value, does not need to involve demonstration or to produce persuasion by its sole  
 8 and intrinsic force, but merely to be worth consideration by the jury. U.S. v.  
 9 Kahaner, 317 F.2d 459, 471 (N.Y. 1963).

10 In this case, Salinas has been involved in three (3) prior shootings, and at least  
 11 eights (8) non-shooting use of force cases. The pattern in each shooting case  
 12 involving Salinas seems to be almost identical: Salinas precipitates the shooting by  
 13 not keeping a safe distance, precipitating an unnecessary physical attack on the  
 14 suspect, claiming the person was armed and then shooting. In each shooting, Salinas  
 15 fails to identify himself as a police officer and fails to give warning prior to shooting.  
 16 All off Salinas' suspect allegedly swing a knife at him, yet, he never gets not even the  
 17 slightest cut. This evidence tends to render less probable Salinas' defense that he had  
 18 to shoot decedent in order to defend himself, and that his conduct was reasonable.  
 19 It proves that Salinas intentionally placed himself in close proximity to decedent, and  
 20 intentionally shot him, even though he was in no real danger.

21 The prior incidents are also relevant to proving *Monell* and supervisory  
 22 liability. Prior incidents tend to prove a pattern or custom and the accession to that  
 23 custom by the policymaker. Grandstaff, et al- v. City of Borger, et al (1985) 767 F.2d  
 24 161, 171, cited in U.S.A. v. Soyland, 3 F.3d 1312, 1318 (9<sup>th</sup> Cir. 1993); Larez, et al  
 25 v. City of Los Angeles, et al, 946 F.2d 630 (9<sup>th</sup> Cir. 1991). Policy, pattern and  
 26 practice can be inferred from prior and subsequent incidents. U.S.A. v. Soyland,  
 27 *supra*, 3 F.3d 1318; Oviatt v. Pearce, 954 F.2d 1470 (9<sup>th</sup> Cir. 1992.) Plaintiffs are  
 28 entitled to offer evidence and solicit testimony from various policymakers about what

1 they knew of Salinas' propensity to use violence, his repeated violent conduct and the  
 2 consequences of that conduct, and what, if anything, the policymakers did with that  
 3 knowledge. The prior shootings Salinas has been involved in should have alerted the  
 4 OPD that Salinas was not qualified to be a police officer and should not be entrusted  
 5 with a deadly weapon. Such evidence is relevant to demonstrate the existence of an  
 6 official policy or widespread custom of illegal and injurious conduct. Board of  
 7 County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 403-04 (1997).

8 A subset of the policy or practice theory of liability for municipalities is one  
 9 alleging a failure to train municipal employees in the rights of its citizens. *See*  
 10 Mackinney v. Nielsen, 69 F.3d 1002, 1010 (9th Cir.1995) (plaintiff can establish  
 11 municipal liability in section 1983 action by showing the municipality made a  
 12 "deliberate" or "conscious" choice to fail to train its employees adequately); City of  
 13 Canton v. Harris, 489 U.S. 378, 389 (1989) ("the inadequacy of police training may  
 14 serve as the basis for 1983 liability only where the failure to train amounts to  
 15 deliberate indifference to the rights of persons with whom the police come into  
 16 contact.") Evidence of numerous prior use of force acts involving Salinas is relevant  
 17 to show failure to train and discipline Salinas.

18 Furthermore, Chief Crombach's individual liability is based upon his having  
 19 notice of numerous other incidents involving Salinas, and yet, failing to take  
 20 appropriate action and/or protective measures to prevent recurrence of such conduct.  
 21 Knowingly refusing to terminate a series of acts by others, which a policymaker  
 22 knew, or should have known, would cause others to inflict the constitutional injury,  
 23 would suffice for individual liability. Larez v. Gates, 946 F.2d 630, 646 (9<sup>th</sup> Cir.  
 24 1991). Individual liability lies for a policymaker's acquiescence in the constitutional  
 25 deprivation, or for conduct showing reckless or callous indifference to the rights of  
 26 others. Watkins v. City of Oakland, California, 145 F.3d 1087, 1093 (9<sup>th</sup> Cir. 1998).  
 27 *See also* Oviatt v. Pearce, 954 F.2d 1470, 1477-79 (9<sup>th</sup> Cir. 1992). Chief Crombach  
 28 had a duty as a Sheriff to prevent continuous and widespread constitutional rights

violations, of which he had actual knowledge.

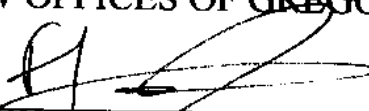
**II.**

**CONCLUSION**

Based on the foregoing, it is respectfully requested that the motion be denied.


Dated: July 6, 2009

LAW OFFICES OF GREGORY A. YATES, P.C.

  
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GREGORY A. YATES  
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TOMAS BARRERA, JR.

Dated: July \_\_\_\_, 2009

LAW OFFICES OF KIM D. SCOVIS

  
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BARRERA, JR.